No. 01-6978

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GARY A. EWING,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

BRIEF OF THE CRIMINAL JUSTICE LEGAL FOUNDATION; SECRETARY OF STATE BILL JONES; SENATORS DICK ACKERMAN, JIM BATTIN, JIM COSTA, RAY HAYNES, ROSS JOHNSON, WILLIAM J. "PETE" KNIGHT, TOM McCLINTOCK, BRUCE McPHERSON, CHARLES POOCHIGIAN; ASSEMBLYMEMBERS PATRICIA BATES, MIKE BRIGGS, DAVE COGDILL, DENNIS HOLLINGSWORTH, LYNNE LEACH, TIM LESLIE, DENNIS MOUNTJOY, ROBERT PACHECO, ANTHONY PESCETTI, GEORGE RUNNER, MARK WYLAND, PHIL WYMAN; AND FORMER ASSEMBLYMEMBER KEITH OLBERG AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does a sentence of 25 years to life for felony grand theft with several prior convictions for serious and violent felonies violate the Eighth Amendment in light of the highly deferential standard for reviewing prison sentences under that provision?

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BRIEF OF THE CRIMINAL JUSTICE LEGAL FOUNDATION, ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment. CJLF has been joined by Bill Jones, California's Secretary of State, who was an author of the three strikes initiative. The brief is also joined by a bipartisan group of California legislators—Senators Dick Ackerman, Jim Battin, Jim Costa, Ray Haynes, Ross Johnson, William J. "Pete" Knight, Tom McClintock, Bruce McPherson,

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

Charles Poochigian; Assemblymembers Patricia Bates, Mike Briggs, Dave Cogdill, Dennis Hollingsworth, Lynne Leach, Tim Leslie, Dennis Mountjoy, Robert Pacheco, Anthony Pescetti, George Runner, Mark Wyland, Phil Wyman; and Former Assemblymember Keith Olberg.

California's three strikes law is an important tool to combat the threat to public safety posed by repeat offenders. Thwarting this provision through an overly expansive interpretation of the Eighth Amendment would be contrary to the interests of victims and society that the CJLF was formed to protect. This is also contrary to the interests of those who enacted the law, as represented by one of its authors, Secretary of State Jones. This is also contrary to the aforementioned legislators, the elected representatives of the people, who best represent the will and moral values of the people of California.

SUMMARY OF FACTS AND CASE

In March 2000, the defendant entered the golf shop at the El Segundo Golf Course in Los Angeles County, California. App. to Pet. for Cert. 25. He was caught in the parking lot with three Calloway golf clubs in his pants, which were valued at $399 each, for a total theft of $1197. See App. to Pet. for Cert. 25.

A jury found the defendant guilty of grand theft. See App. to Pet. for Cert. 23. The defendant "has a lengthy criminal record dating back to 1984, with numerous misdemeanor and felony convictions." App. to Pet. for Cert. 28. In 1993 he was convicted of first-degree robbery and three separate burglary convictions. App. to Pet. for Cert 24. His record also includes convictions for theft, battery, and possession of a firearm convictions. See App. to Pet. for Cert. 28. He has suffered nine prior felony and misdemeanor convictions before his 1993 convictions. See App. to Pet. for Cert. 25. "Two of his prior strike offenses were violent and involved the use of a weapon." See App. to Pet. for Cert. 25. Between 1988 and the date of the current offense, the defendant had been either in prison, on probation, or on parole. See App. to Pet. for Cert. 28.

The defendant was sentenced to 25 years to life under California's three strikes law. See App. to Pet. for Cert. 25; Cal. Penal Code § 1170.12. The trial court denied the defendant's motion to reduce the grand theft conviction to a misdemeanor, see App. to Pet. for Cert. 24-25; *People* v. *Superior Court* (*Alvarez*), 14 Cal. 4th 968, 974-975, 979, 928 P. 2d 1171, 1174, 1177-1178 (1997) (discretion to reduce alternate misdemeanor/felonies to misdemeanors), and denied his motion to strike one or more of his prior serious felony convictions. See App. to Pet. for Cert. 24-25; *People* v. *Superior Court* (*Romero*), 13 Cal. 4th 497, 529-530, 917 P. 2d 628, 647-648 (1996) (discretion to "strike" priors). The state appellate court affirmed the conviction and sentence in an unpublished decision. App. to Pet. for Cert. 24. It rejected the defendant's state and federal constitutional attacks on the proportionality of his sentence, finding the sentence proportional to his crime and criminal history, and similar to sentences meted out to other California offenders. See App. to Pet. for Cert. 29.

On April 1, 2002, this Court granted the defendant's petition for certiorari.

SUMMARY OF ARGUMENT

Any regulation of the state's power to impose prison sentences implicates the most important state function—protecting public safety through the criminal law. Since crime prevention is primarily a function of the states, aggressive judicial review of prison sentences conflicts with federalism. Because fixing punishments for crime is primarily a legislative power, Congress also has an important interest in being free to set the sentences it deems appropriate. The freedom traditionally accorded to legislatures in sentencing has allowed for considerable innovation in this field. As judicial scrutiny potentially conflicts with these vital interests, any standard

governing Eighth Amendment challenges to the proportionality of prison sentences must be very deferential.

In spite of the efforts in Justice Kennedy's concurrence in *Harmelin* v. *Michigan*, 501 U. S. 957 (1991), there are still conflicts between *Solem* v. *Helm*, 463 U. S. 277 (1983) and *Rummel* v. *Estelle*, 445 U. S. 263 (1980) that need to be resolved. The two opinions differ on the deference accorded to the legislature's sentencing philosophy. *Rummel* is highly deferential while *Solem* in part justified the decision to strike down the sentence due to its incompatibility with rehabilitation. *Rummel* provides the better choice, as it is more consistent with the tradition of deferring to legislative policy choices.

The two cases may also differ on the respect accorded to the interest in punishing recidivists. While *Rummel* recognized and relied on this interest, some language in *Solem* indicated that the current crime deserved more focus than the defendant's criminal record. Again, *Rummel* provides the correct approach, as a sentence under a recidivist scheme can only be fairly analyzed in the context of the defendant's criminal record. The defendant's attempts to invoke *Solem* to circumvent consequences of his record should not be accepted. The second and third parts of *Solem*'s three-part test were explicitly rejected in *Rummel*. If a comparison of the defendant's deserts and the harshness of the penalty creates an inference of gross disproportionality, then the other two factors are unnecessary. The fact that other punishments are similarly severe will not save such a sentence. The other two *Solem* factors could only exert an influence in close cases, but in these cases the state should be given the benefit of the doubt. At the very least, courts should be warned about the problems of relying on factors other than comparing desert and punishment, as inexact as that may be.

In light of Ewing's lengthy criminal record, his sentence is not grossly disproportionate. California's three strikes law plays an important role in reducing crime through deterring or incapacitating chronic offenders. Common sense says that

those who continue to offend should be subject to lengthy sentences in order to protect society. Numerous studies show that a relatively small number of offenders are responsible for a very disproportionately large share of crime, and that past criminal behavior is an excellent predictor of future crime. Unsurprisingly, there is evidence to show that three strikes may have contributed to California's dramatic drop in crime since the implementation of the law. While California does not have the burden of proving three strike's efficacy, this does place the defendant's sentence in its appropriate context.

Any doubts about the constitutionality of the defendant's sentence are resolved by his record. Residential burglary is a serious crime which carries a real risk of violence and can substantially traumatize its victims. Robbery is a violent felony which was not present in either *Solem* or *Rummel*. Since Ewing's record is far worse than what confronted the *Solem* or *Rummel* courts, his sentence is constitutional.

ARGUMENT

I. Any standard governing Eighth Amendment challenges to the proportionality of prison sentences must be very deferential.

" 'The most basic function of government' " is " 'to provide for the security of the individual and of his property.' " *Illinois* v. *Gates*, 462 U. S. 213, 237 (1983) (quoting *Miranda* v. *Arizona*, 384 U. S. 436, 539 (1966) (White, J., dissenting)). Punishing crime is integral to any crime prevention scheme, by preventing individuals from doing what society deems undesirable. See 1 W. LaFave & A. Scott, Substantive Criminal Law § 1.5, p. 30 (1986). "The law threatens certain pains if you do certain things, intending thereby to give you a motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may be continued to be believed."

O. Holmes, The Common Law 40 (M. Howe ed. 1963). Without punishment there is no criminal law.

While the Eighth Amendment does limit the state's power to punish, see *Austin* v. *United States*, 509 U. S. 602, 609 (1993), it is applied sparingly to prison sentences. See, *e.g.*, *Harmelin* v. *Michigan*, 501 U. S. 957, 1001 (1991) (Kennedy, J., concurring)[2]; *Solem* v. *Helm*, 463 U. S. 277, 289-290 (1983). Thus there is a tradition of deference to the sentencing choices made by legislatures in noncapital cases. See *Harmelin*, *supra*, at 998 (Kennedy, J., concurring); *Solem*, *supra*, at 290; *Rummel* v. *Estelle*, 445 U. S. 263, 274 (1980). There are strong constitutional and jurisprudential reasons for this deference.

Aggressive federal constitutional review of prison sentences conflicts with federalism. Crime prevention is primarily a function of the states, rather than the federal government. See *Patterson* v. *New York*, 432 U. S. 197, 201 (1977). "Under our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests with the States." *Payne* v. *Tennessee*, 501 U. S. 808, 824 (1991). Constitutional review of prison sentences must take into account that the courts are being asked to intrude upon these vital state interests.

Similarly, Congress has important interests in federal sentencing law. Although sentencing is not the exclusive prerogative of any one branch of the federal government, "Congress, of course, has the power to fix the sentence for a federal crime, [citation], and the scope of judicial discretion with respect to a sentence is subject to congressional control." *Mistretta* v. *United States*, 488 U. S. 361, 364 (1989). When Congress speaks, the courts follow unless the Constitution compels otherwise.

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2. See *infra*, at 15, n. 4.

Until now, sentencing law has seen tremendous innovation. The traditional approach of allowing sentencing judges considerable discretion within the statutory range has been replaced in many jurisdictions by a variety of approaches such as sentencing guidelines, presumptive sentencing, and mandatory minimum sentences. See 5 W. LaFave, J. Israel, & N. King, Criminal Procedure § 26.3(b), pp. 734-735 (2d ed. 1999). Profound disappointment with rehabilitation as a sentencing philosophy, see E. van den Haag, Punishing Criminals 188-189 (1991), has led to a resurgence of incapacitation or retribution-based approaches to sentencing. In most jurisdictions, sentencing is now very different from what it was not too long ago.

California's three strikes law is an important part of this ongoing reform. It protects the public from career criminals by incapacitating or deterring chronic offenders through lengthy sentences. See part III A, *infra*, at 19. Twenty-four states and the federal government now have some form of "three strikes" law. See Clark, Austin, & Henry, "Three Strikes and You're Out": A Review of State Legislation, NIJ Research in Brief, p. 1 (Sept. 1997). As is expected in our federal system, there is considerable variation in these laws. See *id.*, at 7-9. A successful assault on even a part of California's statute threatens these laws and inhibits future reforms. The important federalism interests in sentencing law reinforce the need for an appropriately deferential standard.

II. The conflicts between *Solem* and *Rummel* should be resolved by extending the deference accorded to punishment measures.

There are "tensions" between *Solem* v. *Helm*, 463 U. S. 277 (1983) and *Rummel* v. *Estelle*, 445 U. S. 263 (1980). See *Harmelin* v. *Michigan*, 501 U. S. 957, 998 (1991) (Kennedy, J., concurring). This conflict and *Harmelin*'s divided opinion have left considerable confusion in the courts over the Eighth Amendment's proportionality guarantee. See Brief for Crimi-

nal Justice Legal Foundation, et al. as *Amici Curiae* in *Lockyer* v. *Andrade*, No. 01-1127, pp. 15-19 (available from http://www.cjlf.org/pdf/Andrade.pdf) ("CJLF Andrade Brief"). Further resolution is needed.

Justice Kennedy's concurrence in *Harmelin* sought to resolve the conflicts by identifying common principles in the proportionality cases. See 501 U. S., at 998. These principles reinforce the tradition of deference, and move the balance toward *Rummel* and away from *Solem*. See CJLF Andrade Brief, at 12-15. This case provides the Court with an opportunity to continue this trend, while further clarifying proportionality review of prison sentences. A majority opinion that expands upon Justice Kennedy's *Harmelin* concurrence can do much to settle the law.

A. Philosophy.

Deference is more than being lenient to the state when comparing the severity of the punishment to the defendant's desert. An important component of an appropriate interpretation of the Eighth Amendment is nearly total deference to the sentencing philosophy behind the government's choice of sanctions. Any sentence can have a variety of motivations. Prevention, restraint, rehabilitation, deterrence, education and retribution can all play a part in a state's sentencing philosophy. See 1 W. LaFave & A. Scott, Substantive Criminal Law § 1.5, pp. 30-36 (1986). The exact mix between these and other rationales involves policy choices that are inappropriate subjects for judicial review.

Rummel, *supra*, reflects this principle. The *Rummel* Court was unwilling to extend the Eighth Amendment's proscription much beyond the uniquely cruel and unusual *cadena temporal* of *Weems* v. *United States*, 217 U. S. 349 (1910), out of deference to policy choices behind any sentencing scheme. "But a more extensive intrusion into the basic line-drawing process that is pre-eminently the province of the legislature when it makes an act criminal would be difficult to square with

the view expressed in *Coker* [v. *Georgia*, 433 U. S. 584 (1977)] that the Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices." *Rummel*, 445 U. S., at 275.

The *Rummel* Court gives form to this deference in its treatment of Texas' recidivist scheme. Rummel's life sentence was not based upon his comparatively minor crime of the theft of $120.75 by false pretenses, but due to his long criminal record. See *id.*, at 266. This Court completely accepted the recidivist rationale justifying *Rummel*'s long sentence.

> "This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." *Id.*, at 284-285.

Some language in *Solem*, *supra*, is difficult to reconcile with these principles. The decision did recognize that courts should pay considerable deference to any legislative determination of the appropriate range of sentences. See 463 U. S., at 290. However, other language in *Solem* implies more exacting review than this Court held was proper in *Rummel*. Helm was sentenced to life without possibility of parole under a recidivist sentencing statute. See *id.*, at 281-282. He had six prior nonviolent felony convictions, including three for third-degree burglary. See *id.*, at 279-280. His current conviction was for uttering a "no account" check for $100. *Id.*, at 281.

One reason given by the *Solem* Court for overturning Helm's sentence was that it foreclosed any possibility of his rehabilitation.

> "Helm, who was 36 years old when he was sentenced, is not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of violence of any kind. Incarcerating him for life without possibility of parole is unlikely to advance the goals of our criminal justice system in any substantial way. Neither Helm nor the State will have an incentive to pursue clearly needed treatment for his alcohol problem, or any other program of rehabilitation." *Id.*, at 297, n. 22.

While the *Solem* decision recognized that South Dakota had an interest in punishing recidivists more severely, see *id.*, at 296, unlike *Rummel*, it did not mention the state's incapacitation interest. The incapacitation theory of punishment is the common sense view that prison keeps criminals from continuing to commit crimes. See J. Wilson, Thinking About Crime 193-194 (1977). Some argue that rehabilitation must be coupled with incapacitation "as the vast majority of prisoners will ultimately be returned to society." See 1 LaFave & Scott, *supra*, § 1.5(a)(2), at 32. Others recognize that some criminals pose too high a risk to justify extensive efforts at rehabilitation.

When an individual repeatedly demonstrates an inability to conform to the law, it is no more than common sense to question whether that person will ever conform to the law. Those repeat offenders who continue their habits outside of prison pose a significantly greater threat to society than the occasional lawbreaker. Significant or even lifetime imprisonment is the one sure way to protect society. "If much or most serious crime is committed by repeaters, separating repeaters from the rest of society, even for relatively brief periods of time, may produce major reductions in crime rates." Wilson, *supra*, at 194.

The proper mix of incapacitation and rehabilitation is a policy question that the *Rummel* Court left to the legislatures. *Solem*'s intrusion into such disputes is unwarranted and should not continue. Justice Kennedy's *Harmelin* concurrence

demonstrated a deference to the policy choices behind a sentence similar to *Rummel*'s. See *Harmelin*, 501 U. S., at 1007 ("In asserting the constitutionality of this mandatory sentence, I offer no judgment on its wisdom"). This provides an appropriate starting point for this case.

B. Recidivism.

The defendant utilizes another potential conflict between *Rummel* and *Solem* in order to circumvent the deferential proportionality standard in the context of recidivist sentencing. The *Solem* Court made the following remarks when comparing the gravity of Helm's punishment with his culpability. "We must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for each of his prior offenses. But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision." 463 U. S., at 296, n. 21.

The defense invokes this passage to split the analysis of Ewing's desert and punishment. It first compares Ewing's principle offense, grand theft, with his 25 years to life sentence and unsurprisingly finds an inference of gross disproportionality. The defense then argues that Ewing's criminal career is relevant only after this initial finding, where the State is allowed to use his recidivism to "rebut the inference of gross disproportionality." See Brief for Petitioner, part II B 2.

This approach cannot be squared with the deferential standard announced in *Rummel*, *Solem*, and the *Harmelin* concurrence. See *Harmelin*, 501 U. S., at 999 (Kennedy, J., concurring). The three strikes provision under which Ewing was sentenced is singularly focused on recidivism. As the preamble to the three strikes initiative states, "It is the intent of the People of the State of California in enacting this measure to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." See California Ballot Pamphlet, General Election, November 8, 1994, p. 64 (Proposi-

tion 184) (1994). The defense's analysis removes Ewing's sentence from its antirecidivist context and improperly shifts the burden of justification to the State.

The Constitution permits extraordinary increases in sentences based upon the defendant's prior criminal record. In California, a prior conviction of first- or second-degree murder is a special circumstance that elevates the penalty for first-degree murder from 25 years to life to life without possibility of parole or death. See Cal. Penal Code §§ 190(a), 190.2(a)(2). While 25 to life is a severe sentence, there is a qualitative difference between that and a death sentence that is constitutionally significant. See *Lankford* v. *Idaho*, 500 U. S. 110, 125, n. 21 (1991). Without this prior conviction a death sentence would be unconstitutional absent any other special circumstance. Cf. *Tuilaepa* v. *California*, 512 U. S. 967, 971-972 (1994) (must have at least one "aggravating factor" in order to be eligible for the death penalty). In this circumstance, like any other recidivist scheme, the sentence can only be analyzed in the context of the prior conviction. Examining the present conviction without looking at the criminal record which supports the sentence, tips the balance towards a finding of unconstitutionality.

Notwithstanding the footnote quoted above, *Solem* does not justify the loaded question asked by Ewing. It understood that "a State is justified in punishing a recidivist more severely than it punishes a first offender." *Solem*, 463 U. S., at 296. Recidivism "cannot be considered in the abstract" but rather is examined in light of the facts of the prior offenses. See *ibid.* *Solem* did not begin to answer whether the sentence was unconstitutionally disproportionate before examining Helm's record.

To the extent that *Solem* supports the defendant's approach, it is inconsistent with *Rummel*. "Moreover, given Rummel's record, Texas was not required to treat him in the same manner as it might treat him were this his first 'petty property offense.' Having twice imprisoned him for felonies, Texas was entitled

to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State." 445 U. S., at 284.

As *Rummel* recognized, a sentence that is enhanced due to recidivism can only be analyzed in the context of the defendant's criminal history. Any conflict between this and the dicta of *Solem*'s footnote 21 is best resolved in favor of *Rummel*. Ewing's approach subverts proportionality analysis of recidivist sentencing schemes, and thus should not stand.

C. Objective Factors.

There are other unresolved conflicts between *Solem* and *Rummel*. The *Solem* decision was derived from examining the sentence through three "objective" factors: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U. S., at 292. These last two factors contradict *Rummel*'s analysis.

The dissent in *Rummel* argued that the harshness of Rummel's sentence relative to the punishment for other crimes in Texas supported the unconstitutionality of his sentence. See 445 U. S., at 300-302 (Powell, J., dissenting). This is *Solem*'s second factor, and it was dismissed by the *Rummel* majority in a footnote. See *id.*, at 282-283, n. 27. The footnote correctly noted that any comparison with the punishment for different crimes within the state risked judicial second-guessing of legislative policy choices. "Other crimes, of course, implicate other societal interests, making any such comparison inherently speculative." *Ibid.* All crimes will not be punished alike; ranking the severity of crimes is a matter of legislative policy. As Justice Frankfurter noted for this Court, "Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, . . . these are peculiarly questions of legislative policy." *Gore* v. *United States*, 357 U. S. 386, 393 (1958); accord *Rummel*, 445 U. S., at 282, n. 27.

The third *Solem* factor, a comparison with sentences for similar crimes in other jurisdictions, is also contrary to *Rummel*. The *Rummel* Court rejected the comparison in that case because recidivist statutes involved too many complex variables for any meaningful comparison. See *id.*, at 279-280. Any differences between recidivist schemes are "subtle rather than gross." *Id.*, at 279. Differences in parole policy and the exercise of prosecutorial discretion further complicate the inquiry. See *id.*, at 280-281.

The *Rummel* Court also raised a more fundamental objection to comparing the sentences of different jurisdictions. In a nation with 51 different sentencing laws,[3] there are bound to be different approaches to sentencing. Those sentences at the upper end of the spectrum are automatically suspect under *Solem*'s third factor. The leveling influence of this approach is inconsistent with the crucial federalism interest in allowing a state to punish crime in its own way. "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating offenders more severely than any other State." *Rummel*, 445 U. S., at 282. Innovation is hampered if the most punitive statute is automatically suspect.

Rummel's analysis is superior to *Solem*'s on these points. The second and third *Solem* factors do not add anything meaningful to proportionality analysis of prison terms. If a sentence appears to be grossly disproportionate after comparing punishment and culpability, then any comparison to other punishments within or outside that state are irrelevant. The fact that others punish similarly will not convert an already disproportionate sentence into a constitutionally valid punishment.

The only substantive effect that the second and third *Solem* factors could have is in close cases, where the *Solem* factors

3. The number is even larger if we count other state-like, largely self-governing entities such as the District of Columbia, Guam, and the Virgin Islands.

could tip the balance. An appellate court reviewing a sentence should not make so subtle a distinction. See *Rummel*, 445 U. S., at 279. In close cases, courts should defer to legislatures and resolve any doubts in favor of the constitutionality of the sentence.

Justice Kennedy's *Harmelin* concurrence took a big step in this direction by holding that a sentence is constitutional absent an inference of gross disproportionality, thus bypassing the second and third *Solem* factors. See *Harmelin*, 501 U. S., at 1005 (Kennedy, J., concurring).[4] The concurrence finds that considering the last two *Solem* factors is "appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Ibid.* This use of the *Solem* factors does no more than "*validate* an initial judgment that a sentence is grossly disproportionate to a crime." *Ibid.* (emphasis added). The last two *Solem* factors are analytical appendages, reinforcing a conclusion that the Court would still reach in their absence. This is evident from the two noncapital cases that applied these factors, *Solem* and *Weems* v. *United States*, 217 U. S. 349 (1910). See *Solem*, 463 U. S., at 290-292 (*Weems* applied the three factors utilized in *Solem*).

In *Weems*, the defendant was convicted of the crime of falsifying a public document. His crime was to have knowingly entered a single piece of false information in a public record "though there be no one injured, though there be no fraud or purpose of it, no gain or desire of it." See 217 U. S., at 365. The punishment for the offense was the infamous *cadena temporal*, which included 12 years at hard labor in chains and a form of intensive parole for life. See *id.*, at 366. No amount of comparison to other punishments within or outside the jurisdiction could save this penalty.

4. *Harmelin* was a split decision. Because Justice Kennedy's concurrence was the narrowest concurring opinion in *Harmelin*, it is the holding of the case. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977).

Such comparisons were also unnecessary in *Solem* even though it involved less egregious facts. Helm was convicted of uttering a "no account" check for $100, with six prior convictions. See 463 U. S., at 279-281. Because there was no record of the underlying facts of the prior convictions, see *id.*, at 280, Helms' culpability had to be assessed assuming that he committed the crimes in the least culpable manner covered by the relevant statutes. He had three prior third-degree burglary convictions, but a third-degree burglary in North Dakota "covered entering a building to steal a loaf of bread." *Id.*, at 297, n. 23. Helms' grand larceny conviction could be similarly minor. "It appears that the grand larceny statute would have covered the theft of a chicken." *Ibid.* His other two prior felonies were similarly trivial. There was no minimum amount for his theft by false pretenses conviction, see *id.*, at 280, n. 2, and his final prior felony, third-offense drunk driving, see *id.*, at 280, n. 4, is also minor.

When this long but apparently minor criminal record is compared to a sentence of life without possibility of parole for writing a $100 bad check, one can reasonably conclude that the punishment was grossly disproportionate to the crime. Analysis under the second and third *Solem* factors simply confirmed a conclusion that the Court would have made anyway.

While *stare decisis* is likely to keep the *Solem* factors available, it is important to clarify the potential dangers of these factors. Also, a comparison of culpability and the severity of punishment is the primary focus of proportionality analysis. Any inference of gross disproportionality must be substantial before proceeding to the *Solem* factors or any other objective measures of disproportionality. Courts should not use such factors to color their initial assessment of the punishment's proportionality.

Comparing culpability and the severity of the punishment is no panacea. Lacking other factors to focus the analysis, proportionality analysis is close to the "I know it when I see it" definition of obscenity. Cf. *Jacobellis* v. *Ohio*, 378 U. S. 184,

197 (1964) (Stewart, J., concurring). Unfortunately, proportionality analysis cannot aim much higher. "[A]ny judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." *United States* v. *Bajakajian*, 524 U. S. 321, 336 (1998). Drawing constitutional lines between prison sentences is "troubling" at best. See *Solem*, 463 U. S., at 294.

"It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are 'constituted to respond to the will and consequently the moral values of the people.' " *McCleskey* v. *Kemp*, 481 U. S. 279, 319 (1987) (quoting *Furman* v. *Georgia*, 408 U. S. 238, 383 (1972) (Burger, C.J., dissenting)). Therefore findings of disproportionality must be "exceedingly rare." See *Rummel*, 445 U. S., at 272. Thus, reviewing courts must make every reasonable presumption in favor of the punishment's constitutionality. Any less deference risks substituting judicial philosophy for the legislature's. The conflicts between *Rummel* and *Solem* should be resolved under this principle.

III. Ewing's sentence is not grossly disproportionate to his culpability in light of his lengthy and serious criminal record.

Any assessment of the proportionality of Ewing's sentence must begin with his lengthy criminal record. California has a vital interest in punishing recidivists more severely than first-time offenders, and Ewing's record demonstrates that he is a dangerous career criminal. Because incapacitating the defendant is the only effective way to end his one-man crime wave, Ewing's sentence is not grossly disproportionate to his desert.

A. Recidivism, Incapacitation, and Deterrence.

Society must be allowed to punish repeat offenders more severely. Recidivist statutes are an attempt to diminish crime by concentrating resources on those who pose the greatest danger to society.

> "The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time." *Rummel* v. *Estelle*, 445 U. S. 263, 284 (1980).

Therefore, "recidivism . . . . —prior commission of a serious crime—is as typical a sentencing factor as one might imagine." *Almendarez-Torres* v. *United States*, 523 U. S. 224, 230 (1998). This Court does not have to agree with the philosophy behind the three strikes law to uphold Ewing's sentence. See *Spencer* v. *Texas*, 385 U. S. 554, 568-569 (1967). However, an appreciation of the considerable analytical strength behind California's law reinforces the deference that should be paid to Ewing's sentence.

Recidivist statutes like the three strikes law are sensible. Increasing the penalty for subsequent crimes may deter some of those who were not deterred by the initial penalty. Those who are beyond deterrence and repeatedly commit crimes should be incapacitated for a lengthy time in order to protect society. Arguments to the contrary are counterintuitive. See Janiskee & Erler, Crime, Punishment, and *Romero*: An Analysis of the Case Against California's Three Strikes Law, 39 Duq. L. Rev. 43, 43 (2000).

Statistical evaluation of claims regarding criminal justice is inherently difficult. Data can be difficult to collect. The processing of individuals from suspects into convicted criminal is long and complex. Courts, police, and prosecutorial agencies

are not designed to generate easily collected and quantified data. Even when relevant figures are found, drawing conclusions can be difficult. For instance, it is difficult to separate cause from effect when examining the connection between crime rates and incarceration rates. "Increased incarceration is likely to reduce the amount of crime but there is also little question that increases in crime will translate into larger prison populations." Levitt, The Effect of Prison Overcrowding Litigation, 109 Q. J. Econ. 319, 322 (1996). This is known as "simultaneity bias." *Ibid.* It can also be very difficult to separate the many factors that can influence the crime rate such as weather, demographics, gang wars over the crack cocaine trade, changes in other laws, or changes in prosecutorial emphasis. Since the effects of the many variables cannot be easily separated, measuring the deterrent or incapacitation effect of the three strikes law or similar measures is imprecise at best.

However, there is still statistical support for three strikes' effect on reducing crime. The three strikes law took effect in March 1994. From 1995 to 1998 California's homicide rate declined at an annual rate of 13.36%. From 1992 through 1994 the rate of change for the homicide rate was increased by 1.57%. See Janiskee & Erler, 39 Duq. L. Rev., at 53, 69. These results are statistically significant at the 99.5% level of probability. See *id.*, at 53-54. The violent crime figures tell a similar story. Over the same periods, the violent crime index fell 8.66% annually in the post-three strikes period and, declined only .50% pre-three strikes. See *id.*, at 53. Once again, this was significant at a 99.5% level. See *ibid.* The pre-three strikes total crime rate fell 2.35%, but the post-three strikes total crime rate fell 8.39%. See *id.*, at 52, 67. Although the nationwide crime rate also fell during this period, California's rate fell much faster. See Jones, Why the Three Strikes Law is Working in California, 11 Stan. L. & Pol'y Rev. 23, 24 (1999).

Such figures cannot conclusively prove that three strikes reduces crime, but they do not have to since the state does not have the burden of proving the efficacy of its punishment. See *Rummel* v. *Estelle*, 445 U. S. 263, 285 (1980) (within the discretion of the punishing jurisdiction). These figures reinforce the conclusion that the state has a valid basis for believing that the sentence advances the goals of the criminal justice system in a substantial way, cf. *Solem* v. *Helm*, 463 U. S. 277, 297, n. 22 (1983), which is all that is necessary given the deference due to the legislature.

Three strikes also stands upon a solid theoretical foundation. Numerous studies have examined chronic offenders. "These studies consistently show that offender samples can be subdivided into a low-frequency category (comprised of a large number of 'occasional' offenders) versus a high-frequency category (comprised of a small number of chronic offenders)." R. Wright, In Defense of Prisons 108 (1994). The results are similar whether derived from studies of the arrest records of age-group cohorts, see *id.*, at 109-111 (summarizing studies), or from the self-reported offenses of prisoners. See *id.*, at 111-112 (summarizing research). The estimates may vary from 5% of a cohort being responsible for 75% of all felonies, see L. Shannon, Criminal Career Continuity 217 (1988), or 32% of all offenders being responsible for 82% of total crime index arrests, see M. Wolfgang, T. Thornberry, & R. Figlio, From Boy to Man, from Delinquency to Crime 201 (1987), but in every case a relative handful of offenders are responsible for much crime. Even among recidivists there are chronic offenders. A study of those rearrested within three years of leaving prison in 1994 found that while offenders with 35 or more arrests over their careers were only 12% of the sample, they were responsible for 34.4% of all arrests of recidivists, nearly triple their proportionate share. See Langan & Levin, Bureau of Justice Statistics, Recidivism of Prisoners in 1994, p. 5 (2002) (table 4).

Recidivism figures reflect this reality. The single best prediction of future criminality is a lengthy criminal history. Thus one study found that "after the third arrest there is an approximately 80 percent chance that subsequent arrests will follow." Wolfgang, Thornberry, & Figlio, *supra*, at 85. Similarly, the Bureau of Justice Statistics study found that while 40% of those with 1 prior arrest were arrested within three years of their release, 70.3% of those with 7-10 priors, 79.1% of those with 11-15 priors, and 82.1% of those with 16 or more priors were rearrested within three years of their release. See Langan & Levin, *supra*, at 10 (table 12). Another study tried to replicate the predictive powers of the three strikes law. It examined 73 Canadian offenders who would have qualified for the three strikes penalty and examined their criminal history after release. Under a conservative estimate that tracked only those who had committed the Canadian equivalent of three violent felonies under the three strikes law, the study found that less than one-third of these criminals did not commit any more violent offenses after their release from prison. See Burt, et al., Three Strikes and You're Out: An Investigation of False Positive Rates Using a Canadian Sample, 64 Fed. Probation 3, 4 (June 2000). This figure was considered a conservative estimate of the three strikes "false positive" rate, see *ibid.*, a figure it found distressingly high. See *id.*, at 5. However, since the study could only count those offenses for which the offenders were caught, the harm caused by these recidivists is likely to be much higher than the authors' estimate.

Any total even remotely close to this figure more than justifies the three strikes approach. A one-third "false positive" rate means two-thirds of the sample *did* commit one or more *violent* felonies after release. If someone has a long criminal history, stands convicted of a felony, and has even a 50% chance of subsequently committing a violent felony, then lengthy incarceration is not just acceptable, it is imperative. The Constitution allows states to punish or otherwise limit freedom on the basis of future dangerousness. See *United*

States v. *Salerno*, 481 U. S. 739, 748-749, 755 (1987); *Jurek* v. *Texas*, 428 U. S. 262, 274-275 (1976). Three strikes simply continues this trend, one that has been followed in various forms by Congress and 24 states. See Clark, Austin, & Henry, "Three Strikes and You're Out": A Review of State Legislation, NIJ Research in Brief, p. 1 (Sept. 1997).

There is also substantial anecdotal support for the initiative. In the three years following the initiative there was a substantial exodus of parolees. See Ardaiz, California's Three Strikes Law: History, Expectations, Consequences, 32 McGeorge L. Rev. 1, 29 (2000); see also Janiskee & Erler, *supra*, 39 Duq. L. Rev., at 45-46. "Gregory Gaines, a two-strike parolee from Folsom Prison remarked upon his release that 'a lot of people' at Folsom are frightened by the Three Strikes law. Gaines said, 'I've flipped 100 percent, it's a brand new me, mainly because of the law. It's going to keep me working, keep my attitude adjusted.' " Janiskee & Erler, 39 Duq. L. Rev., at 45. The District Attorney for Kern County, California, "related that 'I go to prisons and do classes for inmates on "three strikes." There is no other topic of conversation within institutions other than the impact of this statute. "Am I a two-striker? Am I three-striker? What if you've got one of these, is that a strike?" And they're intently interested in it. Many of them are talking about moving out of the state.' " *Id.*, at 46.

There are reports that are critical of three strikes' impact on crime. See, *e.g.*, F. Zimring, S. Kamin, & G. Hawkins, Crime & Punishment in California: The Impact of Three Strikes and You're Out (1999); Beres & Griffith, Did "Three Strikes" Cause the Recent Drop in California Crime? An Analysis of the California Attorney General's Report, 32 Loy. L.A. L. Rev. 101 (1998), but they do not prove the case against three strikes. The Zimring study is crippled by severely flawed methodology, such as examining arrest rates so soon after the initiative went into effect. This meant that many of the arrests examined in the study had to be for crimes committed before the three strikes law. See Janiskee & Erler, 39 Duq. L. Rev., at 46-51 (listing

criticisms). Analyzing crime rates for the first few years of the initiative cannot measure three strikes incapacitative effect because those serving sentences during this period would still be in prison even without the three strikes enhancement. Any incapacitative effect will be measured over time as three strikes starts to extend the sentences. Cf. Kessler & Levitt, Using Sentence Enhancements to Distinguish Between Deterrence and Incapacitation, 42 J. L. & Econ. 343, 359 (1999) (describing this effect with respect to sentence enhancements under California's Proposition 8). The Beres and Thompson article is only a "not proven" verdict on three strikes, concluding that "there is no evidence that Three Strikes played an important role in the drop in the crime rate." 32 Loy. L.A. L. Rev., at 102. This conclusion, if true, but see *supra*, at 19, has limited relevance to the Eighth Amendment debate. A state does not have to prove the efficacy of any punitive measure, let alone undertake the prohibitively difficult task of showing that any single measure was by itself responsible for a staggering drop in the crime rate.

Three strikes was a controversial measure within the academic community, and amicus will not try to address every article or study hostile to the measure. "The underlying assumption of this [Zimring's] study—and all similar statistical studies—is that the abstract world of probability is more reliable as a basis for public policy than experience and common sense. It is as if some pre-Socratic philosopher—perhaps Heraclitus— were to put forth the paradox that probability is Being." Janiskee & Erler, 39 Duq. L. Rev., at 43 (footnote omitted). Data, theory, and experience all support the common sense idea behind three strikes, that hardcore recidivist felons should be punished much more severely when they continue to commit felonies.

The three strikes law is part of a long tradition of recidivist laws. The individual states and Congress will differ on how to define and punish recidivists, but that is their right. "Like the line dividing felony theft from petty larceny, the point at which

a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." *Rummel*, 445 U. S., at 285. California has made that choice and it had good reasons for doing so. A look at the facts of Ewing's case demonstrates the wisdom of the decision.

B. The Proper Sentence.

Ewing's case is not one of the "exceedingly rare" examples of a grossly disproportionate prison sentence. Cf. *Rummel*, 445 U. S., at 272. His criminal career is long, varied, and serious. Before his current felony conviction, the defendant had suffered a first-degree robbery conviction, and three separate residential burglary convictions. See App. to Pet. for Cert. 24. He had "suffered nine convictions, some of which were misdemeanors from 1988 through 1993 when he was imprisoned for the robbery and burglary offenses." See App. to Pet. for Cert. 25. His current offense was committed nine months after his release from prison for the robbery and burglary offenses. See App. to Pet. for Cert. 25.

Ewing is a one-man crime wave—he cannot or will not stop offending. Parole and probation seem to have no effect on him, and he was not deterred by his prison sentences. He is a chronic offender who has left society no alternative but to incapacitate him in order to protect itself.

The propriety of Ewing's sentence is reinforced by the facts of this Court's more recent proportionality cases. Ewing's sentence compares favorably to either of the recidivist cases, *Rummel* and *Solem*. *Solem*, the only modern case to strike down a prison sentence on Eighth Amendment grounds, involved a longer sentence for a less culpable defendant. Although Ewing's sentence is long, 25 years to life is still less than Helm's life without possibility of parole. See 463 U. S., at 279. Ewing's current crime, grand theft, is also more severe

than the crime for which Helm was sentenced to life, "uttering a 'no account' check for $100." *Id.*, at 281.

More importantly, Ewing's criminal record is much more severe than Helm's. Although Helm's prior felonies outnumbered Ewing's by six to four, Ewing's are considerably more severe. Unlike Helm's comparatively minor third-degree burglary convictions, see *ante*, at 16, Ewing's burglaries are residential. See App. to Pet. for Cert., at 24.[5] Residential burglary is a much more serious matter than the third-degree, commercial burglary of *Solem*.

The common law had considered burglary to be a very serious offense because of the "abundant terror" of the crime, and the high risk of violence if the burglar is caught in the act by the occupants. See 4 W. Blackstone, Commentaries 223 (1st ed. 1769). At common law, burglary was limited to residential entries at night. See *id.*, at 224-225. While the three strikes law does not distinguish between day and night residential burglaries, this crime still causes significantly more harm, and carries much more danger than the third-degree burglaries of *Solem*.

California courts have consistently recognized that public safety, not protection from trespass or theft, is the essential rationale for its burglary laws.

> "Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence. The laws are primarily designed, then, not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germi-

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5. Only residential burglaries qualify as prior "strikes" under the three strikes law. See Cal. Penal Code §§ 1170.12(b)(1), 1192.7(c)(18) (first degree), 460(a) (first degree=residential).

nation of a situation dangerous to personal safety." *People* v. *Gauze*, 15 Cal. 3d 709, 715, 542 P. 2d 1365, 1368 (1975) (internal quotations omitted); accord *People* v. *Montoya*, 7 Cal. 4th 1027, 1042, 874 P. 2d 903, 911-912 (1994).

Burglary is serious because it takes advantage of our sense of security in our home. See Ardaiz, 32 McGeorge L. Rev., at 18. "It is not just entry into a residence to commit theft. It includes entry to commit assault, rape, robbery, or any number of other felonies. Just ask anybody who has been burglarized whether they have a greater or lesser sense of security after the crime. Ask them whether they continued to feel safe in their home." *Ibid.*

Some victims were asked. A survey of English burglary victims found that "65 per cent of the victims interviewed 4 to 10 weeks after the event said it was still having some effect on their lives." Maguire, The Impact of Burglary Upon Victims, 20 Brit. J. Criminology 261, 264 (1980). The lingering effects were most commonly "a general feeling of unease or insecurity and a tendency to keep thinking about the burglary." *Ibid.* Women were more vulnerable, being more likely to have strongly adverse reactions than men. See *id.*, at 263. A burglary victim "frequently engages in interactions where a consistent theme is voiced: people, especially kids, can't be trusted, and a victim can't expect much help from law enforcement or from insurance companies. Stated in an extreme form, it is a threatening world over which one has little control." Paap, Being Burglarized: An Account of Victimization, 6 Victimology 297, 301 (1981).

Burglary is also a very difficult crime to solve. In 2000, only 13.9% of burglaries known to police were cleared by arrests, as opposed to rates of 56.9% for aggravated assault or 63.1% for murder and "nonnegligent" manslaughter. See U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2001, p. 383 (2002) (Table 4.19). When combined with the considerable distress that comes from

being burglarized, victims are understandably frustrated. See Hawkins, Evaluating the Residential Burglary Victim's Attitude Toward Police, 52 The Police Chief 33, 33 (Dec. 1986). This can only decrease public support for law enforcement. See *id.*, at 33-34. While improved victim relations can alleviate some of this, see *id.*, at 34, burglary still harms the public's perception of law enforcement. When such an invasive crime is so rarely solved, the perception of public safety is rightly diminished.

Burglary is also deemed a violent felony under § 1402 of subtitle I of the Armed Career Criminal Act of 1986. See 18 U. S. C. § 924; *Taylor* v. *United States*, 495 U. S. 575, 578 (1990). This statute provides a sentence enhancement of a defendant convicted of unlawfully possessing a firearm, see 18 U. S. C. § 922(g), who has three or more prior convictions for "a violent felony or a serious drug offense . . . ." See 18 U. S. C. § 924(e)(1). "Violent felony" specifically includes burglary. *Id.*, subd. (e)(1)(B)(ii). In *Taylor*, the defendant claimed that his two prior convictions for second-degree burglary under Missouri law should not count as violent felonies "because they did not involve 'conduct that presents a serious potential risk of physical injury to another,' under § 924(e)(2)(B)(ii)." 495 U. S., at 579. Because the statute did not define burglary, the Court had to ascertain what Congress meant for that term to cover. See *id.*, at 580.

After reviewing the history of the statute and its predecessor, see *id.*, at 581-587, this Court came to several conclusions. "First, . . . Congress focused its efforts on career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Id.*, at 587-588. Congress appreciated the risk of a violent confrontation caused by the burglar's intrusion. See *id.*, at 588. Congress thus concluded that those burglaries "punishable by imprisonment for more than a year constituted a category of crimes that shared this potential for violence and that were

likely to be committed by career criminals." *Ibid.* Therefore, the Court rejected petitioner's contention that Congress only included a subclass of burglaries that were either "especially dangerous" or fit the common law definition. See *id.*, at 598. Instead, the Court adopted the "generic" modern definition of burglary "an unlawful or unprivileged entry into, or remaining in, a building or other structure with intent to commit a crime." *Ibid.*

The three strikes burglary is much more severe, being limited to residential burglaries, and requiring an intent to commit larceny or a felony. See *supra*, at 25, n. 5; Cal. Penal Code § 459. Residential burglary is a serious matter. It carries a real risk of danger and involves the violation of one's most personal space. It is thus very traumatic for the victims and can undermine police authority. California is justified in treating multiple prior convictions of this crime very severely.

Any doubt about Ewing's record is erased by his robbery conviction. See App. to Pet. for Cert. 24. California defines robbery traditionally, as the "taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force of fear." Cal. Penal Code § 211. Ewing's propensity for violence is further demonstrated by his battery and possession of a firearm and by the fact that two of his "strikes" "were violent and involved the use of a weapon." See App. to Pet. for Cert. 28. Ewing's extensive criminal record outside his strikes is also relevant to his sentence. California courts have the authority to avoid a three strikes enhancement by dismissing one or more of the prior "strikes" in the interest of justice. See *People* v. *Williams*, 17 Cal. 4th 148, 161, 948 P. 2d 429, 437 (1998). Since one's criminal record outside of the strikes would be relevant to this decision, it is also relevant to the Eighth Amendment analysis of any three strikes sentence.

Ewing is much more dangerous than Helm, and received a less severe sentence. While he received a potentially longer sentence than Rummel, Ewing is considerably more dangerous.

See *Rummel*, *supra*, 445 U. S., at 265-266 (*Rummel*'s nonviolent record). Given the strength of California's interest in incapacitating chronic offenders and Ewing's serious and violent record, his sentence was not grossly disproportionate to his culpability.

CONCLUSION

The decision of the California Court of Appeal for the Second Appellate District should be affirmed.

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